



## Designer-Led Design-Build Overcoming the Obstacles

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Judging from the level of interest at last October's Design Build Conference, the hottest topic is designer-led design build. Similarly, a survey by the Educational Division of one of the largest professional liability insurers revealed that designer-led design build is the leading topic of design professionals' interest.

Although design build continues to capture an increasing share of the construction market, the frequency of designer-led design build is low, performed primarily by the largest E/C firms or by integrated companies that have both design and construction expertise in-house. However, there is no reason why A/E firms of any size cannot be participating in the design-build market, leading their respective teams.

The principals of most A/E firms have a general "feeling" that there exist insurmountable obstacles to designer-led design build. These feelings are unjustified. When one examines the potential obstacles in detail, it becomes apparent that designer-led design build is not only plausible but at least as logical and workable as more traditional contractor-led design build.

## Structuring the Team

The key to overcoming any obstacles is to structure the design build team appropriately. The first step is for the A/E firm to create a sister corporation (or limited liability company), owned by the owners of the A/E firm in the same ratio, to be its construction division. The design firm will enter into contracts for design services with owners, and the construction company will enter into separate contracts with owners for the construction and related construction phase services. The construction company would be a "shell," occupying the same office space and using the same employees, so that owners would not perceive a distinction between the design firm and the construction company.

The construction company will perform the construction by subcontracting 100% of it to a general contractor who is the A/E's design build teammate. All of the duties performed by the construction company would be subcontracted to the general contractor, who would in turn subcontract most of the work.

This structure contemplates the owner signing sequential contracts, rather than a single design build contract at the start of the project. The owner first contracts for design services, and when the owner is prepared to convert the project to design build, signs the construction contract with the designer's construction company.

## Overcoming the Obstacles

The following are the most frequently expressed reasons why designer-led design build supposedly isn't feasible.

### 1. Lack of construction experience.

This obstacle is overcome by the structure of the team with an experienced general contractor as the 100% subcontractor. The general contractor provides the construction expertise for the team, even if the design professional lacks it. After all, in more traditional contractor-led design build, it could just as easily be asserted that the contractor lacks design experience.

### 2. Lack of financial / bonding capacity.

It is true that design firms rarely have substantial financial capacity, particularly compared to contractors who ordinarily maintain much greater capitalization in order to secure their bonds. However, this obstacle can be overcome by a mechanism that gives the owner direct access to the financial capacity of the general contractor, even though there isn't a contract directly between them.

One such mechanism is a conditional assignment of the 100% subcontract. Such a document would provide that in the event that the A/E's construction company defaults on the construction contract, the owner would be assigned that company's rights under the 100% subcontract with the general contractor. Thus, in the event that the construction company could not satisfy the owner's claim, the owner would have direct access to the assets of the general contractor.

Alternatively, the owner could be made a third party beneficiary of the 100% subcontract. In the event of a problem arising out of the construction, the owner would then have a claim directly against the financially sound general contractor in addition to the A/E's "shell" construction company.

These mechanisms can work on a bonded project as well. The general contractor would merely be required to name the owner as an additional obligee on the performance bond. This solution is not without precedent: construction managers have long been persuading owners that projects are sufficiently secure if the prime trade contractors are bonded, even if the CM is not.

### 3. Insurance problems.

The team structure described above actually creates less insurance problems than in traditional contractor-led design build projects. By establishing two separate companies, the designer has separated its professional liability from its

non-professional liability. Each company procures the appropriate type of liability insurance and names the other as an additional insured. The president of one of the leading professional liability insurance companies has already approved this structure for some of its insureds.

#### 4. Construction risks.

This is a major concern expressed by design professionals, but the structure above virtually eliminates these risks. There are numerous possible construction risks: subcontractor default, defective work, mechanic's liens, etc. It is true that the designer's construction company would be liable to the owner for all of these problems. However, the general contractor would have identical liability to the designer's construction company.

Essentially, the A/E's construction company is in a pass-through position. Since it has subcontracted 100% of its construction responsibilities, the general contractor is liable to it for any construction liability that it incurs to the owner. It is perfectly feasible to require the general contractor to indemnify the A/E's construction company against such risks.

The only real risk to the designer's construction company is that the general contractor may become insolvent. That risk may be overcome by carefully choosing a financially sound general contractor or by requiring a performance bond.

It is also possible that construction liability may result from a design error or omission. In that event, however, the designer's professional liability insurance is available to satisfy the claim. Furthermore, liability for design errors and omissions exists regardless of whether the designer leads the design build team or of whether the project is delivered by design build.

The above suggested team structure actually minimizes the risks to the designer from construction accidents. Ordinarily, such risks are insured under the designer's professional liability policy, with large deductibles. Under the suggested structure, the claim would be defended by the A/E's construction company's (or the general contractor's) general liability carrier, with little or no deductible charged to the designer's companies.

#### 5. Licensing obstacles.

Designer-led design build is less likely to encounter licensing obstacles than traditional contractor-led design build. All states license A/E's; only some states license general contractors. In jurisdictions where contractors must be licensed, the designer should simply arrange to have its construction company obtain a license.

6. Owner reluctance. This is the only real obstacle to designer-led design build, and it is attitudinal not structural. Designer-led design build is rare, and owners who have been told of the obstacles listed above are often skeptical.

However, there are tremendous rewards to be earned by design professionals who lead design build projects. They must educate owners as to the advantages and feasibility of such projects. After all, the A/E develops the initial relationship with and trust of the owner, who often would be more than happy to let the design professional run the entire project and bring it to completion. As the frequency of designer-led design build grows, this problem will undoubtedly diminish.

## About the Author

Mark C. Friedlander is a partner in the Construction Law Group at the law firm of Schiff Hardin LLP. He obtained his B.A. from the University of Michigan in 1978 and his J.D. from Harvard Law School in 1981. He is currently an adjunct professor at the University of Illinois at Chicago School of Architecture and a lecturer at Northwestern University's Engineering School, and had lectured at the Illinois Institute of Technology School of Civil Engineering from 1987-89, at the Engineering School of the University of Wisconsin in 1988 and 1990, and the Architecture School of the Georgia Institute of Technology in 1997-98. Mr. Friedlander concentrates his practice in construction law and litigation with particular emphasis on design-build methods of project delivery.

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